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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-134

JAY LEE GIBSON, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the United States For the Fifth Circuit

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CERTIFICATE

Ernest L. Sample, of Counsel for Petitioner certifies that the Petition for Rehearing of J. L. Gibson, on Petition for Writ of Certiorari now filed in this cause is presented in good faith and not for delay and it is restricted to the grounds specified in Rule 58.

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J. L. Gibson

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To The Honorable Supreme Court Of The United States Of America:

The Petition for Rehearing of Petitioner J. L. Gibson respectfully alleges:

CERTIFICATE

This petition is restricted to matters allowed by Rule 58 and does not contain argument previously submitted.

ARGUMENT

In its "Interpretation" the Board said:

> "It was the opinion of the Referee that termination of the claimant's employment relationship was not proper since his name was retained on the posted seniority lists; but it was not intended to put the claimant back on the engine or return him to engine service *as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held.*"

Up to this point the claim had been handled as a disciplinary matter by both the carrier and the Board, but never as a medical matter. Gibson never had a chance to meet the issue of whether he was physically able to run a train, because the issue, prior to that ruling, was the carrier's contention that Gibson had "disqualified" himself by filing the perfectly legitimate FELA suit to obtain a partial disability judgment. This primitive attitude was never justified. It was a disciplinary ruling. If the ambiguous ruling of the Board can be so construed, it was arbitrary, and so judged by the District Court. If it was a medical ruling, the issue had never been made, and no hearing obtained.

Requirements for a "hearing", *Bell v. Burson,* 29 L.Ed. 2d 90, 91 S.Ct.____, ____U.S.____, and representation by counsel, *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799; 83 S.Ct. 792 have been imposed as minimum standards for "due process" in State Proceedings, judicial and administrative, under the 14th Amendment. Surely the Fifth Amendment does not require less, nor does it authorize non-reviewable administrative proceedings with no

hearing on the merits. *Barlow v. Collins,* 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192.

If a convicted criminal (*Gideon v. Wainwright*) or an uninsured motorist (*Bell v. Burson*) or a welfare claimant (*Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011) are entitled to a review on such constitutional guarantees, surely a Railroad Engineer, who devoted his life (from the age of 16 years) to his work, and whose wages helped pay the taxes to guarantee these rights to murderers, thieves, aliens, and draft evaders, should be given the same protection against arbitrary action.

Gibson has sought, and has now been denied, both the remedies which this Honorable Court has recognized, in other cases, as his right, *Czosek v. O-mara,* 397 U.S. 25, 25 L.Ed.2d 21, 90 S.Ct. 770.

At a comparatively mild age he was set adrift in an outer orbit of meaningless legal jargon by the Board's holding that, although the carrier was wrong, and Gibson was right, he was entitled to be an employee but not entitled to work.

Now, after all the years spent in seeking just one fair hearing on the merits of his claim, Gibson is approaching retirement age, but has not been allowed to work for twenty years. The NRAB has said it intended that Gibson be "entitled to all the benefits the same as if he were on a retired basis as an employee." Yet it has no jurisdiction whatsoever over retirement matters. The Court is invited to reflect upon the prospect of the Railway Retirement Board trying to pass upon the application of an employee for retirement benefits who has not run a train for twenty years—who was neither eligible for, or applying for, such

benefits before the NRAB and whose only hope for some appropriate definition of his rights lay in a return to duty. When the Board comes to consider whether Gibson is "an individual in the service of one or more (Railroad) employers for compensation (§ 228a, Title 45 U.S. Code, Railroad Retirement Act)", or to decide when his compensation was "earned" (§ 228a(f) Title 45 U.S. Code), or what his "compensation" was (Subsec. (b), § 228a, Title 45 U.S.C.), or whether to spread his award for personal injuries over 34 years of actual service or 50 years of lapsed time, his rights as a "retired employee", even if recognized, will remain as meaningless as his rights as an active employee.

PREMISES CONSIDERED, Petitioner prays that this motion be granted.

Respectfully submitted,

ERNEST L. SAMPLE
906 Goodhue Building
Beaumont, Texas

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for rehearing on petition for writ of certiorari has been mailed, on the 3rd day of November, 1971, to attorneys for respondent, as follows: Mr. James P. Simpson, 1507 Pacific Avenue, Room 900, Dallas, Texas 75201 and Mr. Charles S. Pipkin, P. O. Box 1632, Beaumont, Texas 77704.

ERNEST L. SAMPLE